COA NO. 45907-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AARON WILLIAMSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT ERRED IN GIVING A LIMITING INSTRUCTION THAT ALLOWED THE JURY TO CONSIDER EVIDENCE OF PRIOR BAD ACTS FOR A PROPENSITY PURPOSE.

The State claims there is nothing wrong with the limiting instruction because "lustful disposition" evidence is not ER 404(b) evidence. Brief of Respondent (BOR) at 15-16. The State is mistaken. It is established that evidence of lustful disposition is ER 404(b) evidence. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991) (the Supreme Court has "consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female.")

"An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 423-24, 269 P.3d 207 (2012). The limiting instruction here did neither of those things. The State makes no reasoned argument to the contrary.

Instead, the State argues the error was harmless because evidence of the crime charged was overwhelming. BOR at 17-18. The State

chastises undersigned counsel for "disingenuously" asserting that this was a "he said she said case" that could have gone either way. BOR at 14.

The criticism is curious in light of the fact that the trial prosecutor — the same prosecutor representing the State on appeal — argued to the jury that "really the only element that is in dispute at this point is forcible compulsion" and that it did not disagree with defense counsel's description of the case as a "he said she said." RP 394, 397. According to the prosecutor, the case "boils down to at this point an issue of credibility." RP 398.

There was no dispute that Williamson groped L. The disputed issue was whether he used force to touch her in an intimate area on the day in question. There was no independent eyewitness to what happened that day. There was no physical corroboration that Williamson used force. It was her word against his that he did.

The State argues the error is harmless because Williamson admitted to fondling L. numerous times over the years. BOR at 18. But he did not admit to fondling her *with force* over the years.

The jury, however, heard ER 404(b) evidence that both Williamson's prior bad acts and his sexual attraction to L. were escalating to the point where he had difficulty controlling himself, and L. testified that Williamson had forced himself on her in the past even when she

protested. RP 262, 336, 343. The flawed limiting instruction allowed the jury to treat that behavior as proof that Williamson had a propensity to use force when encountering resistance and, acting in conformity with his character to engage in escalating sexual conduct, must have committed the charged crime of indecent liberties by forcible compulsion for which he stood charged. The instruction, by failing to limit the lustful disposition evidence to its proper purpose, allowed the jury to use prior lustful acts as evidence of a propensity to commit the crime charged and prejudiced the outcome.

2. PROSECUTORIAL MISCONDUCT VIOLATED WILLIAMSON'S DUE PROCESS RIGHT TO A FAIR TRIAL.

a. The Prosecutor Committed Misconduct On Cross Examination By Getting Williamson to Call L.'s Testimony Untruthful.

The State claims it did not commit misconduct in deliberately eliciting Williamson's testimony that L. was untruthful. BOR at 19-20. But it cites no authority to back up that claim. It does not and cannot distinguish this case from those where misconduct was found. See, e.g., State v. Padilla, 69 Wn. App. 295, 299, 846 P.2d 564 (1993); State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996); State v. Barrow, 60 Wn. App. 869, 875, 809 P.2d 209, review denied, 118 Wn.2d 1007, 822 P.2d 288 (1991); State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810

P.2d 74, review denied, 118 Wn.2d 1007, 822 P.2d 287 (1991); State v. Wright, 76 Wn. App. 811, 822, 888 P.2d 1214 (1995). The law flatly condemns what the prosecutor did here.

b. The Prosecutor Committed Misconduct In Closing Argument By Exceeding The Law Conveyed In The Jury Instructions, Misstating The Law And Arguing A Fact Not In Evidence.

The State contends it did not commit misconduct in arguing the pastor was a mandatory reporter in an effort to destroy Williamson's credibility. According to the State, the pastor is a "social service counselor" under RCW 26.44.030(1)(a) and thus qualifies as a mandatory reporter. From that premise, the State argues it did not misstate the law. BOR at 21-22.

Case law defeats the State's position. First, only those with professional training in social services meet the definition of a "social service counselor" under the mandatory reporter statute. Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 426, 428, 167 P.3d 1193 (2007), review denied, 164 Wn.2d 1009, 195 P.3d 87 (2008). There is no evidence in this record that Williamson's pastor had professional training in social services. RP 274-75, 278-79, 285-86, 326-28. The pastor does not qualify as a "social service counselor" and is not a mandatory reporter for this reason alone.

Second, the Supreme Court has held as a matter of statutory interpretation that "members of the clergy counseling their parishioners in the religious context" are not subject to the mandatory reporting requirement. State v. Motherwell, 114 Wn.2d 353, 360, 788 P.2d 1066 (1990). A contrary rule "that requires clergy to report under all circumstances could serve to dissuade parishioners from acknowledging in consultation with their ministers the existence of abuse and seeking a solution to it." Motherwell, 114 Wn.2d at 359.

The record shows Williamson's pastor counseled his parishioners in the religious context. RP 274-75, 278-79, 285-86, 326-28. He functioned in his capacity as pastor in speaking with his parishioners about the abuse allegation. Williamson's pastor was not a mandatory reporter. So the prosecutor misstated the law in arguing that he was.

The State does not address Williamson's argument that the prosecutor also committed misconduct in arguing a fact not in evidence, i.e., that a conversation took place in which the pastor told Williamson he would report the abuse to police if Williamson did not. By failing to respond, the State effectively concedes the point. See State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) ("The State does not respond and thus, concedes this point.").

Further, the prosecution's statements to the jury must be confined to the law stated in the court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). The jury instructions do not define what a mandatory reporter is. The prosecutor committed misconduct in arguing the pastor was a mandatory reporter when the law on what constitutes a mandatory reporter was not stated in the jury instructions. The State does not address this argument either.

c. The Prosecutor Committed Misconduct By Invoking His Personal Integrity And the Prestige Of His Office In An Effort To Sway the Jury.

Without citation to authority, the State maintains the prosecutor did not place his personal integrity or his office's prestige on the line. BOR at 24. Williamson's argument in the opening brief adequately refutes the State's position and need not be repeated here.

d. Reversal Of The Conviction Is Required Because The Misconduct Could Not Be Cured By Court Instruction And There Is A Substantial Likelihood That It Affected The Outcome.

The State claims "there were no errors and thus, no accumulation of prejudice was possible." BOR at 25. Content to rest on its argument that no misconduct occurred at all, the State does not address whether the cumulative effect of the misconduct resulted in prejudice that affected the outcome and could not be cured by instruction. Repeated instances of

misconduct did occur. The opening brief lays out the argument for why reversal is required under a cumulative impact analysis.

3. THE COURT IMPROPERLY RELIED ON THE POSSIBILITY OF GOOD TIME CREDIT WHEN IMPOSING AN EXCEPTIONAL SENTENCE.

The State contends the sentencing court's consideration of early release for good time credit in imposing the exceptional sentence is harmless error. BOR at 27-28. According to the State, overwhelming aggravating factors justified the imposition of an exceptional sentence and therefore no remand is necessary. BOR at 28 (citing State v. Wakefield, 130 Wn.2d 464, 478, 925 P.2d 183 (1996); State v. Fisher, 108 Wn.2d 419, 429-30, 739 P.2d 683 (1987)).

The State's contention fails. It is implausible to argue the trial court's reliance on the possibility of good time is harmless error where the court explicitly relied on the possibility of good time as a determinative factor in setting the length of the sentence. RP 489, 493. The trial court did the math. The way in which it did the math is untenable because it calculated the possibility of early release into the equation.

Williamson challenges the length of the exceptional sentence because it rests on an untenable reason, not whether aggravators support the imposition of an exceptional sentence in the first place. The distinction is critical in assessing whether the error is harmless.

In Wakefield, there was no reversible error where (1) the trial court merely commented at the sentencing hearing that Wakefield likely would serve less time, but did not justify the exceptional sentence on this basis; (2) the trial court imposed the exceptional sentence relying solely on valid aggravating factors; and (3) even if the trial court initially considered the possibility for early release when imposing the exceptional sentence, it would in all probability impose the same sentence on remand. Wakefield, 130 Wn.2d at 478. In Wakefield, no remand was necessary because the aggravating factors supporting the sentence were valid and the record did not show the trial court placed considerable weight on the possibility of early release in setting the length of the exceptional sentence.

The aggravating factor in Williamson's case supporting the sentence was valid but, in contrast to Wakefield, the trial court expressly relied on the possibility of early release to set the length of the exceptional sentence. RP 489, 493. The court wanted Williamson to remain incarcerated until his youngest daughter was 18 years old. The court considered the availability of good time in imposing an exceptional 17-year minimum sentence. As explained by the trial court, that length of sentence would keep Williamson confined until his daughter reached the age of majority, based on the assumption that Williamson would earn good time. RP 493. Under these circumstances, it cannot be said the

court would impose the same duration of sentence on remand absent consideration of the possibility for early release.

Fisher recognized if an appellate court invalidates certain factors upon which the sentencing judge obviously placed "considerable weight" in his sentencing decision, a remand for resentencing is appropriate. Fisher, 108 Wn.2d at 430 n.7. In S.H., for example, the Court of Appeals found the aggravating circumstances justifying the exceptional sentence were valid but reversed the 260 week disposition because the trial court improperly considered the possibility of early release when it set the term of commitment. State v. S.H., 75 Wn. App. 1, 5, 15-16, 22, 877 P.2d 205 (1994), review denied, 125 Wn.2d 1016, 890 P.2d 20 (1995). Similarly, the Court of Appeals in Duncan affirmed the imposition of an exceptional sentence but remanded for reconsideration of the sentence duration because the length of the sentence appeared to be based in part on speculation of earned early release. State v. Duncan, 90 Wn. App. 808, 815-16, 960 P.2d 941 (1998).

In Williamson's case, the record is even clearer that the trial court placed considerable weight on the availability of good time in setting the duration of the exceptional sentence. RP 489, 493. The error is not harmless. Remand for resentencing is required. The State does not challenge Williamson's argument made in the opening brief that

resentencing should take place before a different judge to satisfy the appearance of fairness.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Williamson requests reversal of the conviction, and if the Court declines to reverse, remand for resentencing before a different judge.

DATED this 23rd day of October 2014

Respectfully Submitted,

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	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF OCTOBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AARON WILLIAMSON
DOC NO. 371165
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
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SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF OCTOBER 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

October 23, 2014 - 1:58 PM

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